(7) (6) (5)

Nos. 85-541, 85-584 and 85-717

FILED
MAY 9 1986
F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner*,
v.

ARTHUR QUILLER, *et al.*, *Respondents*.

JACK GRANT, JR., *et al.*, *Petitioners*
v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent*.

ARTHUR QUILLER, *et al.*, *Petitioners*,
v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent*.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

JAY M. SAWILOWSKY
Counsel of Record for Quiller, et al
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG, Attorney for Quiller, *et al* and Grant, *et al*
NIXON YOW WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910
(404) 722-7541

THOMAS W. TUCKER
Counsel of Record for Grant, et al
DYE MILLER TUCKER & EVERITT
P.O. Box 2426
Augusta, GA 30903
(404) 722-0771

JOHN BELL TOWILL
DAVID E. HUDSON,
Attorneys for Grant, *et al*
HULL TOWILL NORMAN & BARRETT
P.O. Box 1564 (13)
Augusta, GA 30913
(404) 722-4481

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Depository Institutions Deregulation and Monetary Control Act of 1980 was not an Absolute Preemption Statute 2

II. DIDMCA, § 501(c) Requires that in Order for Contracts to be Entitled to Preemption, Consumers be Granted a Contractual Right to Notice of Default and a Contractual Right to Cure that Default Within 30 Days 5

III. The Eleventh Circuit Court of Appeals' Ruling in *Quiller* does not Cast Doubt on the Enforceability of Large Quantities of Outstanding Mobile Home Transactions 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES: Page

Board of Governors of the Federal Reserve System v. Dimension Financial Corporation, 474 U.S. ___, 88 L.Ed.2d 691 (1986) 8

Conley v. Gibson, 355 U.S. 41 (1957) 7

Ford Motor Credit Co. v. Hunt, 241 Ga. 342, 245 S.E.2d 295 (1978) 6

Phillips v. Allis-Chalmers Credit Corp., 177 Ga. App. 323, 339 S.Ed.2d 302, 303 (1985) 2

STATUTES

Depository Institutions Deregulation and Monetary Control Act of 1980 ..... *passim*

CODE SECTIONS

O.C.G.A. § 10-1-30 2

U.C.C. Art. 9, § 503 6

REGULATIONS

12 C.F.R. § 590.4 ..... *passim*

45 Fed.Reg. 31122 (May 12, 1980) 5

45 Fed.Reg. 43681 (June 30, 1980) 5

MISCELLANEOUS REFERENCES

Mobile Home Usury Preemption: Hearings Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, S.Hrg. 99-1382 ..... 4, 8

The New York Times, Oct. 6, 1985 9

Time, Nov. 18, 1985 9

Rakoff, *Contracts of Adhesion*, 96 Harv.L.R. 1174 (1983) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-541, 85-584 and 85-717

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner,*

v.

ARTHUR QUILLER, *et al.*, *Respondents.*

JACK GRANT, JR., *et al.*, *Petitioners,*

v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent.*

ARTHUR QUILLER, *et al.*, *Petitioners,*

v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. The Depository Institutions Deregulation And Monetary Control Act Of 1980 Was Not An Absolute Preemption Statute.

The fallacy of the position of the United States that the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) only governs conduct subsequent to the time of a transaction is two-fold: (1) it ignores the language of DIDMCA and (2) it ignores the fact that DIDMCA was not an absolute preemption statute that preempted all state laws governing the finance charges that could be assessed on mobile home credit sale transactions and loan transactions.[1]

For example, let the following be answered: would a lender, which elected not to pay the price for preemption and which did not charge finance charges in excess of applicable state law be subject to a suit

---

[1] The United States erroneously refers to the term "usury," a term which relates to the charging of excessive interest on loans. *See Phillips v. Allis-Chalmers Credit Corp.*, 177 Ga.App. 323, 339 S.E.2d 302, 303 (1985). The *Quiller* transaction and the *Grant* transaction, like most mobile home credit transactions, involve a "time-price sale" arranged by dealers who in turn discounted the mobile home contracts to finance companies. Transactions such as this are generally governed by comprehensive state retail installment sales acts. In this case, both the *Quiller* and *Grant* transactions were governed by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq. Credit is prearranged between the dealer and finance company and financing is generally tied to the trailer. The financing market is captive as opposed to the financing of conventional homes which are generally financed by loans from third parties. Contrary to the implications made by the United States in Note 17, the rights of the Quillers and Grants under this statute are contractual obligations which cannot be abrogated by subsequent amendments to Georgia statutes.

enjoining conduct inconsistent with DIDMCA and the consumer protection regulations promulgated thereunder when it computed finance charges pursuant to the Rule of 78s, when it assessed late charges after only 10 days, when it immediately and without notice accelerated the payments or when it immediately and without notice repossessed a mobile home or foreclosed a security interest? The answer is absolutely NO!

The United States, on p.11, Note 10, admits that any failure to comply with 12 C.F.R. § 590.4(d)(e)(f) and (g) which is discernable on the face of the contract would result in loss of preemption. Those regulations govern balloon payments, prepayment penalties, late charges and deferral fees. Those regulations were enacted in order to comply with DIDMCA § 501(c)(1). DIDMCA, § 501(c)(2) mandates the notice of default and the right to 30 days in which to cure the default. These are even more important protections. Both these sub sections are exactly coordinate and are, in fact, part of the same sentence of DIDMCA which referred unmistakably to the content or the "terms and conditions" of the credit sale contract. There is not even a whisper in DIDMCA about any "self-enforcing" provisions.

The mobile home finance industry, in urging Congress to enact the mobile home section of DIDMCA, told Congress that credit sales utilizing the "Rule of 78s" and credit sales "failing to incorporate appropriate purchaser protections drawn from the traditional real estate mortgage field" would not be entitled to the preemption of state laws governing

finance charges.[2] The traditional real estate mortgage field has long utilized uniform promissory note forms and mortgage forms that have been approved by the Federal Home Loan Mortgage Corporation (FHLMC) and by the Federal National Mortgage Association (FNMA). These forms that are utilized nationwide contain a contractual right to a notice of default and a contractual right to 30 days in which to cure the default.[3]

Section 501(c) of DIDMCA was consistent with what was requested by the mobile home finance industry; that is, a limited preemption of state laws that only applied to certain "federally related mortgage lenders" who drafted contracts with "terms and conditions" that complied with DIDMCA and the consumer protection regulations enacted by the Federal Home Loan Bank Board (FHLBB). While granting the FHLBB broad discretion in formulating these consumer protection regulations, Congress specifically required that in connection with preemption transactions, mobile home purchasers would have as a "term and condition" of their contract a right to a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases of abandonment or extreme circumstances), a provision consistent with the contractual provisions

---

[2] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, S.Hrg. 99-1382 (hereinafter referred to as 1985 Senate Hearings), p.207-208, testimony presented by Mr. Will Ehrle on behalf of the Coordinating Counsel on Manufactured Housing Finance, February 21, 1980, and appearing in this November, 1985 testimony.

[3] Case No. 85-541, Quiller Appendix N, p.58a.

contained in traditional real estate mortgage documents. DIDMCA § 501(c)(2).

At the time the consumer protection regulations were proposed and adopted, the FHLBB's position was clear that creditors would be entitled to preempt state law only if their contracts were consistent with those regulations. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980). Thus, both Congress and the FHLBB understood at the time of the enactment of DIDMCA and the adoption of the consumer protection regulations that creditors would not be entitled to preempt state laws governing finance charges if consumers were not granted a right to a notice of default and a right to cure that default within 30 days prior to repossession or foreclosure. It was also the obvious intent of both that if the "terms and conditions" of the mobile home contract contained language inconsistent and antagonistic with the requirements of the consumer protection regulations contained at 12 C.F.R. § 590.4, the contract did not preempt state law. Creditors whose contracts did not comply with DIDMCA, § 501(c), and 12 C.F.R. § 590.4 did not lose any preemption; they merely never qualified for it in the first instance.

II. DIDMCA, § 501(c) Requires That In Order For Contracts To Be Entitled To Preemption, Consumers Be Granted A Contractual Right To Notice Of Default And A Contractual Right To Cure That Default Within 30 Days.

While Congress granted broad authority to the FHLBB to promulgate consumer protection regulations, it mandated that consumers be given a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases

of abandonment or extreme circumstances). DIDMCA, § 501(c)(2). Under the Uniform Commercial Code, a creditor is entitled to peaceably repossess a mobile home immediately and without notice unless the creditor's right is modified by contract. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978); U.C.C. Art. 9, § 503. The only way the consumer is going to have the right to notice of default and the right to cure that default within 30 days is for that right to exist by virtue of the terms and conditions of the contract. If the contract is silent on the subject, the debtor is subject to U.C.C. Art. 9, § 503.[4]

The United States argues that obligations imposed by law could not be dispensed with by agreement of the parties. However, that argument presupposes that all mobile home credit sale contracts had been preempted by DIDMCA. The only way to determine whether or not a contract is governed by state law

---

[4] The United States correctly points out that the Eleventh Circuit Court of Appeals rejected this argument. However, in doing so, the Court relied heavily on the "Vartanian" letter. Between the date of the panel opinion and *en banc* briefing, this letter was exposed for exactly what it was, an unofficial opinion solicited *ex parte* at the request of General Electric Credit Corporation in order to defeat litigation pending in the state courts of Arkansas. No efforts were made to "publish" or "promulgate" this unofficial letter until after the requesting party determined that it was beneficial to it. If letters such as the "Vartanian" letter can determine issues such as those being presented here, then issues such as this will be decided depending upon what party in litigation has the most clout with a particular governmental agency. As the Federal Register does not contain any proposed amendment to the regulations, evidently this process continues. See page 4 of the Supplemental Brief filed by General Electric Credit Corporation in Opposition to Petition.

or whether or not the lender has paid the price for preemption is to review the "terms and conditions" of the contract. Otherwise, creditors do exactly as was done in the *Quiller* case, that is, they argue that the contract is governed by some other statute.[5]

Mobile home contracts such as those used in the *Grant* and *Quiller* cases are typical contracts of adhesion. Purchasers are frequently unaware of complicated rules of contract construction and such contracts should be construed through the eyes of the typical consumer to determine whether or not the finance company used terms and conditions to impose illegal burdens upon the consumer. *See* Rakoff, *Contracts of Adhesion*, 96 Harv.L.R. 1174 (1983).

III. The Eleventh Circuit Court Of Appeals' Ruling In *Quiller* Does Not Cast Doubt On The Enforceability Of Large Quantities Of Outstanding Mobile Home Transactions.

The United States, like certain mobile home finance companies who have appealed to Congress for retroactive pardons, has been unable to offer any specific figures to support its "sky is falling" arguments. However, numerous finance companies and lenders, in drafting their contracts, have paid specific attention to the "price for preemption" and have specifically granted as a term of the contract the right to notice of default and a contractual right to cure that

---

[5] The United States argues in fn.12 that based on the language of the complaint, the *in judicio* admissions in the pleadings by BarclaysAmerican, as well as the *in judicio* admissions concerning the conduct of BarclaysAmerican are irrelevant since the district court dismissed this case on a FRCP 12(b)(6) motion. This argument ignores notice pleading under the Federal Rules of Civil Procedure. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

default within 30 days, and have insured that the other terms and provisions were consistent with those consumer protections contained in DIDMCA § 501(c) and in 12 C.F.R. § 590.4.[6] In answering questions posed by the Senate, trade organizations representing BarclaysAmerican produced a copy of the current form contract used by BarclaysAmerican, which specifically grants consumers a contractual right of notice of default and a contractual right to cure that default within 30 days, and which has other terms and conditions which are consistent with DIDMCA and the consumer protection regulations contained at 12 C.F.R. § 590.4.[7] The fact of the matter is that only a few finance companies are known to have charged finance charges in excess of those permitted by state law while not paying the price for preemption. These finance companies, whose contracts are in violation of state law, are subject to the remedies provided by state law and arguments concerning the economic consequences to either party are irrelevant and *de hors* the record.

CONCLUSION

Adherence to the statutory language of DIDMCA demands that the "terms and conditions" of the credit sale contract be considered in determining whether or not state law has been preempted.[8] The United States has ignored this principle for purposes of ex-

---

[6] 1985 Senate Hearings, *supra*, p.20, p.51-52, 53-54, 55-56.

[7] *Id.*, p.270-271.

[8] *See Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. ___, 88 L.Ed.2d 691 (1986).

pediency and for perceived economic considerations. A position like that taken by the United States would give credence to the legal philosophy "that the law is no more than a means by which unjust power relations are dressed in the costume of external truths."[9]

The issues in No. 85-584 involve important questions of federal law which have, in part, been emasculated and obscured by unofficial opinions and varying positions of the FHLBB obtained *ex parte* in an effort to support certain arguments contrary to the clear and unambiguous language of DIDMCA. This Court should decide these issues and grant the petition for writ of certiorari in No. 85-584. The petition in No. 85-717 should be granted only if this Court grants the petition in No. 85-541.

---

[9] *Time*, Nov. 18, 1985, p.87. *The New York Times*, Oct. 6, 1985, p.58, discussing Critical Legal Studies.

Respectfully submitted,

JAY M. SAWILOWSKY
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG
Of Counsel:
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910

THOMAS W. TUCKER
Of Counsel:
DYE, MILLER, TUCKER & EVERITT
P.O. BOX 2426
Augusta, GA 30903

JOHN BELL TOWILL
DAVID E. HUDSON
Of Counsel:
HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564 (13)
Augusta, GA 30913